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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARGARET KAWAAUHAU and SOLOMON KAWAAUHAU,
Petitioners,

v.

PAUL W. GEIGER,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a Creditor seeking to except a claim from discharge pursuant to §523(a)(6) of the Bankruptcy Code as a willful and malicious injury prove that the Debtor intended to injure the Creditor?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Margaret Kawaauhau and Solomon Kawaauhau, respectfully pray that a writ of certiorari be issued to review the judgment of the Eighth Circuit Court of Appeals entered in this proceeding May 14, 1997.

OPINIONS BELOW

The ruling of the United States Bankruptcy Court for the Eastern District of Missouri which excepted from discharge Petitioners' judgment against Geiger is reported at 172 B.R. 916 (Bankr. E.D. Mo. 1994).[1] The ruling of the United States District Court for the Eastern District of Missouri which affirmed the ruling of the Bankruptcy Court is unreported. The ruling of the Court of Appeals for the Eighth Circuit which reversed the District Court's affirmance of the Bankruptcy Court is reported at 93 F.3d 443 (8th Cir. 1996) which decision was subsequently vacated by the grant of Petitioner's suggestion for rehearing *en banc*. The Eighth Circuit at the rehearing *en banc* also reversed the District Court's affirmance of the Bankruptcy Court. *In re Geiger*, 113 F.3d 848 (8th Cir. 1997). The decisions are reprinted in Appendices A-D, *infra*.

STATEMENT OF JURISDICTION

The decision of the Eighth Circuit Court of Appeals was entered on May 14, 1997. This Court's jurisdiction to consider civil cases in the courts of appeals is invoked pursuant to 28 U.S.C. §1254(1).

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[1] The Bankruptcy Court for the Eastern District of Missouri's decision denying Geiger's Motion for Summary Judgment in an earlier summary judgment proceeding is reported at 114 B.R. 649 (E.D. Mo. 1990) but is not directly the subject of this petition for certiorari and is therefore not included in the appendix.

STATUTORY PROVISION INVOLVED

11 U.S.C. §523(a)(6)

STATEMENT OF THE CASE

Petitioner Margaret Kawaauhau visited Respondent/Debtor Physician Paul Geiger ("Geiger") for treatment of a severe infection in her leg at his office in Hawaii. Her symptoms consisted of pus oozing from a toenail, redness, swelling of the leg, fever and a high white blood count. Geiger admitted that he knew at the time of admission to the hospital that Mrs. Kawaauhau was in grave danger. Geiger admitted that he knew at that time that the appropriate course of treatment was intravenous penicillin and that he knowingly failed to provide such treatment. Geiger admitted that he knew the serious consequences of failing to provide adequate or proper treatment to a patient with Mrs. Kawaauhau's medical history and condition. Mrs. Kawaauhau lost her leg due to Geiger's malpractice. She filed suit and obtained a judgment against Geiger. Geiger subsequently fled Hawaii and started a new practice in St. Louis, Missouri. When his wages were garnished, Geiger filed for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §701 et seq., creating a bankruptcy estate where the only significant creditor was Mrs. Kawaauhau. The unsecured creditors, including the Kawaauhaus, received no distribution from the bankruptcy estate.

Petitioners filed a complaint in the United States Bankruptcy Court for the Eastern District of Missouri, Judge David P. McDonald presiding, to except their judgment from discharge as a willful and malicious injury under 11 U.S.C. §523(a)(6). The Bankruptcy Court excepted the malpractice judgment from discharge pursuant to 11 U.S.C. §523(a)(6). *In re Geiger*, 172 B.R. 916 (Bankr. E.D. Mo. 1994). While the evidence at the malpractice trial and the discharge trial was that Geiger intentionally ignored what he knew to be the proper standard of care and that Petitioner Kawaauhau lost her leg due to that malpractice, Petitioners did not and do not claim that Respondent intended to harm Mrs. Kawaauhau. The Court held that Geiger's conduct was malicious for purposes of §523(a)(6) because it "was so far below the standard level of care that it can be categorized as willful and malicious conduct for dischargeability purposes." Further, it constituted "disregard of acceptable medical practice..." "Dr. Geiger's egregious errors of judgment led to the worsening of Mrs. Kawaauhau's condition and to the eventual amputation of part of her leg." App., *infra*, A-13 and A-14.

Respondent appealed to the United States District Court for the Eastern District of Missouri, Chief Judge Jean C. Hamilton presiding, which affirmed the judgment of the Bankruptcy Court in an unpublished opinion. The District Court upheld the Bankruptcy Court's finding that Geiger's conduct was certain or substantially certain to cause physical harm and therefore constituted a willful and malicious injury, thus causing the debt to be non-dischargeable. App., *infra*, A-22.

Respondent then appealed to the United States Court of Appeals for the Eighth Circuit. The panel reversed the decision of the District Court, holding that the malpractice judgment should be not excepted from discharge. *In re Geiger*, 93 F.3d 443 (8th Cir. 1996):

> "Although we have not previously ruled on the precise question of whether medical malpractice judgments are dischargeable in bankruptcy, we have held that conduct that is merely reckless is not malicious within the meaning of the statute. See *Cassidy v. Minihan*, 794 F.2d 340, 344 (8th Cir.1986); *In re Long*, 774 F.2d 875, 880-81 (8th Cir. 1985). We have expressed the belief that Congress intended "to allow discharge of liability for injuries unless the debtor intentionally inflicted an injury." *Cassidy*, 794 F.2d at 344. As a result, we found that a judgment for injuries caused by the debtor's drunk driving was dischargeable because the debtor was, at most, guilty of reckless conduct." App, *infra*, A-25.

A Petition for Rehearing *En Banc* before the Eighth Circuit Court was granted, thus vacating the panel decision. On rehearing *en banc*, the Eighth Circuit agreed with the panel's decision. The Circuit Court argued that a claim cannot be excepted from discharge under §523(a)(6) unless the debtor actually intended to cause the harm in question. The Circuit Court held that "for a judgment debt to be non-dischargeable under the relevant statute provision, it is necessary that it be based on an intentional tort. App., *infra*, A-34. The Circuit Court further defined "intentional tort" as a "legal category that is based on the consequences of an act rather than the act itself." App., *infra*, A-34, citing Restatement (Second) of Torts 8A, comment a, at 15 (1965). Because Petitioner acknowledges that Respondent did not intend to cause Petitioner to lose her leg, Petitioner's claim failed under that standard. Accordingly, the Court allowed Petitioner's judgment to be discharged. App., *infra*, A-37.

The Circuit Court specifically acknowledged that its decision conflicted with decisions of other courts, noting that "We are aware that other Circuit Courts have reached legal conclusions that are at odds with our holding on this case. *See*, e.g., *Perkins v. Scharffe*, 817 F.2d at 394, and *In re Franklin*, 726 F.2d 606, 610 (10th Cir. 1984)." App., *infra*, A-36.[2] It concluded, however, that its approach was preferable because the other circuits

[2] The difficulty which courts have had in interpreting §523(a)(6) is illustrated by *In Re Hartley*, 75 B.R. 165 (Bankr. W.D. Mo. 1987); *and aff'd* 100 B.R. 477 (W.D. Mo. 1988); *reversed* 869 F.2d 394 (8th Cir.), *aff'd. on reh'g. en banc*, 874 F.2d 1254 (8th Cir.1989); where on rehearing *en banc* the Circuit Court let stand the ruling of the District and Bankruptcy Courts excepting a judgment from discharge by a highly unusual, evenly divided vote of the Circuit Judges.

had paid insufficient attention to the legislative history of the relevant statute provisions.[3]

[3] The Circuit Court's decision may also be in conflict with the decision of this Court in *Tinker v. Colwell*, 24 S.Ct. 505, 193 U.S. 473, 48 L.Ed. 754 (1904), which was decided under the Bankruptcy Act of 1898 and which decision was, according to some authorities, overruled by the passage of the Bankruptcy Reform Act of 1978 . The majority and dissent in the instant case disagreed on this issue. Geiger *en banc*, App., *infra*., A-32 (majority opinion); Geiger *en banc* App., *infra*., A-43 (dissenting opinion). The other circuit courts of appeal in their opinions cited herein disagree as to whether the passage of the Bankruptcy Reform Act of 1978 overruled *Tinker*.

REASONS FOR GRANTING THE WRIT

THE EIGHTH CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS OF OTHER UNITED STATES CIRCUIT COURTS OF APPEAL AND IS CONTRARY TO AN EXISTING DECISION OF THE UNITED STATES SUPREME COURT.

I. Two Other Courts of Appeals Faced With Attempts By Patients To Except Medical Malpractice Claims From Discharge in Bankruptcy Have Rejected The Intent Requirement Adopted by The Court Of Appeals in This Case.

The analysis of the Court of Appeals cannot be reconciled with the analysis of the Tenth Circuit *in In re Franklin*, 726 F.2d 606 (10th Cir. 1984). That case involved a doctor who had prescribed anesthesia without taking a medical history. The patient suffered a heart attack and severe brain damage caused by medical malpractice of a Chapter 7 debtor-physician. The Tenth Circuit acknowledged that the debtor-physician did not intend to cause the injury, but did intend the actions that caused the injury. The Tenth Circuit noted that the Bankruptcy Court found that the physician's actions amounted to a "willful disregard of what he knew to be his duty" and a "complete and total disregard of acceptable medical practice.[4] Id. at 611. The Tenth Circuit affirmed the exception to discharge and held that:

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[4] Circuit Judge Murphy in her dissent in the instant case notes that Franklin was decided under the provision of the Bankruptcy Act of 1898 that was the predecessor to §523(a)(6) of the current Bankruptcy Code. App. A-47. Subsequent Tenth Circuit decisions under the Code, however, have maintained the standard set forth in *Franklin*. *See*, e.g., *In Re Pasek*, 983 F.2d 1524, 1527 (10th Cir. 1993) ("A willful and malicious injury occurs when the debtor, without justification or excuse, and with full knowledge of the specific consequences of his conduct, acts notwithstanding, knowing full well that his conduct will cause particularized injury.").

> By finding that this testimony is insufficient to contradict evidence of willful and wanton conduct, this Court does not intend to imply that Appellant performed the surgery in an effort to bring about the cardiac arrest which caused such drastic injury to Sanchez. However, there is little doubt that Appellant intended the acts that he did perform, which acts performed in the manner and the conditions present in this particular situation, necessarily resulted in the injury. This is sufficient to support a finding of willful and malicious conduct.

In re Franklin, 726 F.2d at 610.

The Sixth Circuit has followed the Tenth Circuit's approach in another malpractice-discharge case, *Perkins v. Scharffe*, 817 F.2d 392 (6th Cir. 1987). In *Perkins*, the Sixth Circuit was faced with a situation where the debtor, a podiatrist, provided medical treatment which was characterized as "appalling." *Perkins*, 817 F.2d at 392. The debtor unnecessarily injected plaintiff's foot with an unsterilized needle, ignored the test results which indicated the appropriate drug treatment, and failed to hospitalize the plaintiff. Relying on the Tenth Circuit opinion in *Franklin*, the Sixth Circuit in *Perkins* excepted the judgment from discharge:

> We find that the facts in the case before us are very similar to the facts before the court in *Franklin* and we therefore reach the same conclusion as did the court in that case. Our opinion is reinforced by the leading bankruptcy treatise, which states:
>
> > In order to fall within the exception of Section 523(a)(6), the injury to an entity or property must have been willful and malicious. An injury to an entity or property may be a malicious injury within this provision if it was wrongful and without just cause or excessive, even in the absence of personal hatred, spite, or ill will. The word "willful" means "deliberate

> or intentional," a deliberate and intentional act which necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury." Collier on Bankruptcy §523.16 (15th Ed. 1991).

Perkins v. Scharffe, 817 F.2d at 394.

Because Respondent plainly intended the acts that were held to constitute malpractice, Petitioner's case would have succeeded under the *Franklin* and *Perkins* analysis followed by the Sixth and Tenth Circuits. The Eighth Circuit did not disagree with the perception that those courts would have treated this case differently, but simply rejected the analysis of those courts as unsatisfactory.

II. The Decision Also is Inconsistent With The Decisions of Other Courts of Appeals in Non-Medical Malpractice Discharge Cases Under §523(a)(6).

The Court of Appeals' intent requirement also conflicts with the decisions in nonmedical malpractice discharge cases from the Second, Fourth, and Ninth Circuits.

For example, the Second Circuit's decision in *In Re Stelluti*, 94 F.3d 84 (1996), involved an allegedly innocent spouse who signed a check on request of her overbearing husband. Mr. Stelluti was the sole shareholder and officer of Crossroads Truck Center, Inc. Mrs. Stelluti was a mere bookkeeper. Both had guaranteed a floor plan for secured creditor Navistar. Through a series of transactions, the Stellutis withdrew $621,000 from the Crossroads operating account on which Navistar had a lien because it contained vehicle proceeds. Some of the cash ended up in personal accounts and some ended up in Crossroads' new accounts 60 miles away in New Jersey. Mrs. Stelluti testified in the adversary to except the debt from discharge that she knew the

money was the property of Crossroads and acknowledged that the transfers to a bank in New Jersey did seem "a little strange." Mrs. Stelluti claimed that when she asked Mr. Stelluti about the transfer, he got angry and told her that "everything would be all right." The Court concluded that she "was not aware that the funds belonged to Navistar," *id.* at 88, but reasoned, despite her lack of knowledge, that her deliberate intention to transfer the funds was enough to justify excepting the debt from discharge. *Id.*

The Fourth Circuit applied similar reasoning in *St. Paul Fire and Marine Insurance Co. v. Vaughn*, 779 F.2d 1003 (1985). That case arose from the Debtor's misappropriation of a government check. There was no specific evidence that he intended to harm anyone, but he presumably intended to benefit himself and his interests. The Fourth Circuit determined that it would "place a nearly impossible burden upon a creditor who wishes to show that a debtor intended to do him harm." 779 F.2d at 1010. Accordingly, the Court excepted the debt from discharge notwithstanding the lack of the specific intent to harm the creditor. *Id.*

Another similar decision is *In re Cecchini*, 780 F.2d 1440 (9th Cir. 1986). In *Cecchini*, the debtor was directly involved in the conversion of a hotel owner's funds. The Bankruptcy Appellate Panel for the Ninth Circuit concluded that in order to except an injury from discharge, a debtor must inflict an intentional injury. The Ninth Circuit reversed, holding that application of a "looser standard" was appropriate. Under this construction, the creditor would not be required to prove that the debtor acted with intent to injure.[5]

[5] To be sure, a later panel of the Ninth Circuit in *In Re Gergely*, 110 F.3d 1448 (9th Cir. 1997), held that the medical malpractice in the case before it was not "willful and malicious." That panel did not, however, question the general applicability of Cecchini; it simply concluded on the facts of that particular case that the malpractice in question was not willful and malicious.

All three of those cases, like this one, involved deliberate acts by a debtor that resulted in a serious, albeit unintended, harm to a creditor. In each case, the Court of Appeals excepted the resulting claim from discharge under §523(a)(6). Application of the analysis of those decisions to this case would result in reversal of the judgment of the Court of Appeals. Thus, although some courts of appeals have adopted analysis similar to that of the Court below[6] it is clear that the circuits disagree on the level of intent required for an injury to become willful and malicious for purposes of §523(a)(6).

CONCLUSION

A computerized search for the term 11 U.S.C. §523(a)(6) in bankruptcy cases reveals more than two thousand cases citing this statute since the passage of the Bankruptcy Reform Act of 1978. While some of these cases may be mere mentions, during the year ending December 31, 1995, more than 70 reported decisions by the various bankruptcy courts of the United States primarily involved §523(a)(6) issues. While there appear to be fewer reported cases in 1996, there is no reason to believe 1995 was an aberrational year. Clearly there were other adversary complaints filed involving §523(a)(6) which did not result in the published opinions. §523(a)(6) is one of the most frequently litigated sections of the Code as creditors seek to except their claims from discharge. The presence of a clear conflict in the circuits on the issue of what constitutes a willful and intentional injury in general, coupled with the ability of a debtor otherwise

[6] *See*, e.g., *In re Conte*, 33 F.3d 303 (3d Cir. 1994) (Legal malpractice consisting of intentional concealment of dismissal of medical malpractice case from client resulting in expiration of medical malpractice statute of limitation held *dischargeable*; *Matter of Delaney*, 97 F.3d 800 (5th Cir. 1996) (per curiam) (use of double barreled sawed off shotgun resulting in serious facial wound held *dischargeable*); *In re Walker*, 48 F.3d 1161 (11th Cir. 1995) (employer's failure to obtain worker's compensation insurance held *dischargeable*).

acting in good faith to elect jurisdictions in which he will file petitions for relief[7] cries out for a clear resolution by this Court.

Respectfully submitted,

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[7] Debtors may file for relief where they have lived for the longest period during the 180 days before filing. 28 U.S.C. §1408(a). A debtor otherwise acting in good faith could move and file in the new district and circuit 91 days later or even sooner if he had lived in multiple districts previously. It is worth noting that petitioner's complaint to except respondent's actions from discharge apparently would prevail under the *Cecchini* test applied in the Ninth Circuit, where respondent committed the tortious acts in question.

APPENDIX

APPENDIX A

UNITED STATES BANKRUPTCY COURT
E.D. MISSOURI
EASTERN DIVISION

Bankruptcy No. 89-0154
Adv. No. 89-0154

In re Paul W. GEIGER,
Debtor,

Margaret KAWAAUHAU & Solomon Kawaauhau,
Plaintiffs,

v.

Paul W. GEIGER,
Defendant.

MEMORANDUM OPINION

Aug. 23, 1994

DAVID P. McDONALD, Bankruptcy Judge

JURISDICTION

This Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334, 151, and 157 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. This is a "core proceeding" pursuant to 28 U.S.C. § 157(b)(2)(I), which the Court may hear and determine.

PROCEDURAL BACKGROUND

On March 16, 1989, Dr. Paul W. Geiger filed his voluntary petition seeking protection under Chapter 7 of the Bankruptcy Code. Plaintiffs, Margaret and Solomon Kawaauhau, filed this adversary complaint seeking to deny discharge of the debts Dr.

Geiger owed them as a result of a judgement they received in a state court malpractice suit. Plaintiffs assert that Dr. Geiger's conduct, which gave rise to their recoveries, was willful and malicious as those terms are used in section 523(a)(6) of the Bankruptcy Code.

FACTUAL BACKGROUND

Upon consideration of the testimony, record and argument of counsel the Court finds that:

Debtor, Dr. Paul Geiger, served as Mrs. Kawaauhau's physician for approximately five (5) years, from 1977 until 1983, during which time he treated her for a variety of ailments, including, diabetes, obesity, hypertension, chronic obstructive pulmonary disease and congestive heart failure. On or about January 4, 1983, Mrs. Kawaauhau sought medical attention from Dr. Geiger after dropping a box on her right foot. During her visit to Dr. Geiger's office, Mrs. Kawaauhau complained of chills, dizziness, pain in her right calf and having had a 102 degree fever the previous night. Her right leg experienced some jerking. Mrs. Kawaauhau's leg was swollen and red and pus oozed from beneath the nail of the large toe on her right foot.

Dr. Geiger diagnosed Mrs. Kawaauhau's condition as thrombophlebitis of the right leg, prescribed oral doses of Tetracycline in addition to standard thrombophlebitis treatment, and admitted her to the hospital. A blood analysis performed after her admission to the hospital displayed a "left shift" in her blood's composition. After her first day in the hospital, Mrs. Kawaauhau developed a blister on her right calf. On January 5, 1983, Dr. Geiger had hospital personnel sample and analyze both tissue from Mrs. Kawaauhau's large toe and fluid from the blister on her leg. The analysis of the blister fluid identified Gram, positive cocci bacteria in pairs. The culture made from Mrs. Kawaauhau's toe tissue suggested that Tetracycline was effective against the bacteria in her system. Dr. Geiger continued

to treat Mrs. Kawaauhau with Tetracycline administered orally, except that she was given one dose of Vigramycin (I.V. Tetracycline) intravenously.

On January 6, 1983, further tests revealed the presence of beta streptococcus bacteria in Mrs. Kawaauhau's system. Dr. Geiger continued to treat Mrs. Kawaauhau with Tetracycline administered orally. The tests were returned five days later.

On January 7, 1983, Dr. Geiger stopped treating Mrs. Kawaauhau with Tetracycline and prescribed Penicillin for her, to be administered orally. Dr. Geiger testified in a subsequent malpractice suit, in which he was the defendant, that he knew that Penicillin, administered intravenously, would have been more effective than oral Penicillin but that he prescribed oral Penicillin because Mrs. Kawaauhau had previously conveyed to him her desire to minimize the cost of her treatment (FN1) and he believed she was absorbing medicine through her stomach well.

Debtor left Mrs. Kawaauhau in the care of other doctors when he went away on business on January 8, 1983. These doctors treated Mrs. Kawaauhau with Moxam and Penicillin, administered intramuscularly, and, because her condition had continued to deteriorate, arranged to fly her to Honolulu where she could receive care from an infectious disease specialist. Upon his return on January 11, 1983, Dr. Geiger canceled Mrs. Kawaauhau's transfer to Honolulu because he thought she looked stronger and more alert than when he left her days earlier. Also on January 11, 1983, Dr. Geiger discontinued giving Mrs. Kawaauhau all antibiotics. Dr. Geiger based this decision on the grounds that:

(a) Mrs. Kawaauhau's blood was very thin (coagulating very slowly) and that antibiotics have a tendency to thin one's blood;

(b) He thought the infection in Mrs. Kawaauhau's leg had burned itself out;

(c) a culture of the leg suggested that there was no strep bacteria left in the leg; and

(d) the Doctor was concerned with the possibility of Mrs. Kawaauhau developing a superinfection.

Mrs. Kawaauhau did not receive any antibiotics for two days and on January 14, 1983 after further deterioration in the condition of her leg, and consultation with surgeons, the decision was made to amputate Mrs. Kawaauhau's leg below the knee.

Mrs. Kawaauhau and her husband Solomon sued Dr. Geiger in the Circuit Court for the Third Circuit of Hawaii for medical malpractice based on his treatment of Mrs. Kawaauhau's right leg. The Kawaauhaus presented the expert testimony of Dr. Peter Halford, a board certified surgeon, at that trial. Dr. Halford testified that Dr. Geiger had failed to provide adequate care in his treatment of Mrs. Kawaauhau's leg when he:

(a) failed to diagnose Mrs. Kawaauhau's condition as an infection by the second day of hospitalization;

(b) administered Tetracycline to Mrs. Kawaauhau because it is not a very effective antibiotic and poses a risk to people like Mrs. Kawaauhau who have kidney problems;

(c) failed to administer Penicillin on January 5, 1983, the day the lab identified the bacteria in Mrs. Kawaauhau (the expert testimony indicated that Tetracycline, unlike Penicillin, is not effective against the type of bacteria the lab identified);

(d) prescribed oral doses of Penicillin rather than intravenous Penicillin (which expert testimony indicated would have been more effective);

(e) discontinued administering antibiotics to Mrs. Kawaauhau on January 11, 1983; and

(f) canceled Mrs. Kawaauhau's transfer to Honolulu.

Dr. Geiger testified in his own defense and acknowledged that he recognized that, from January 7 to the morning of January 12, the standard of care for Mrs. Kawaauhau was penicillin by intravenous route for her streptococcus infection. He said such treatment was the best, "... but sometimes we're not permitted to give the best." He insisted that Mrs. Kawaauhau complained that medical expenses were too high and she wanted to keep the cost down. Based on her statements he used oral penicillin, which cost $4.00 per day, in contrast with intravenous penicillin that costs $40.00 per day.

Prior to the state court trial, Dr. Halford reviewed Dr. Geiger's treatment of Mrs. Kawaauhau and prepared a report of his review. At trial Dr. Halford testified that, in his report, he had concluded that, "I feel that this patient could have been and should have been managed differently, and her outcome would have been drastically different."

In preparation for the instant adversary complaint Dr. Peter Halford gave the following testimony in his deposition:

Q. What is the first area of mismanagement that you noticed with respect to Dr. Geiger's care of Mrs. Kawaauhau?

A. The first area involved the misdiagnosing this as a phlebitis rather than an infectious process when she had very obvious signs of infection, namely, pus from the toenail, redness, swelling, fever and a high white count.

Q. What's the next area of substandard or mismanagement that you noticed in her care?

A. The next problem was that of the wrong antibiotics being utilized for treatment of her infection. He utilized Tetracycline, which is not proper for the type of infection that she had, especially with her having underlying diabetes, hypertension and obesity.

* * * * *

Q. Eventually did Dr. Geiger administer penicillin to her?

A. That was the third problem with this case, was that he eventually did pick penicillin. It was however, some four days after he should have started penicillin and he gave it by the wrong route, primarily--I mean he gave it by the wrong route, meaning he gave it by mouth instead of by vein, and the blood levels just cannot be reached properly by mouth that you need to address this type of life-threatening infection.

Q. What do you mean by blood levels? Can you explain to us the effectiveness of oral penicillin versus intravenous?

A. By blood level I mean the amount of antibiotic that reaches the blood and in turn gets delivered to the area where the infection is proceeding. You need to get that high level of penicillin chemical into the bloodstream. And to give it by mouth means it has to go through the digestion process and get absorbed by the stomach, and even the best of oral doses won't reach as high a level as you need--as you can get by giving it intravenously directly into the bloodstream.

* * * * *

A. I think that cost certainly plays a role in what we choose if you have an alternative that is more economically feasible, but cost should have no role in directing your therapeutic efforts when you are dealing with life and death. And to me that was a gross error that was made by being concerned about several hundred dollars versus the loss of limb and life.

* * * * *

A. A fourth area of concern was that he actually stopped all intravenous antibiotics that were being administered to her on January 12th, I believe.

* * * * *

A. The significance, I believe, is that it reveals that Dr. Geiger knew, in fact, that intravenous penicillin was the appropriate standard of care for this type of problem and yet he intentionally used something that was less effective for the sake of cost. (FN2)

Q. (By Mr. Roehrig): Doctor, what's the necessary result of the intention of administering of substandard care under these circumstances?

A. The result is that the infection will progress at a much more rapid rate and more viciously than otherwise.

Q. In this particular case what did that result in in regards to injury to Mrs. Kawaauhau?

A. It resulted in her requiring amputation to save her life and in permanent kidney damage.

On March 25, 1987 a jury found Dr. Geiger guilty of medical malpractice and a judgment was entered in the Circuit Court of the Third Circuit, State of Hawaii in favor of the Plaintiff Margaret Kawaauhau and against Paul W. Geiger as follows: special damages, $203,040.00; general damages, $99,000.00. Judgment was also entered in favor of Plaintiff Solomon Kawaauhau and against Paul W. Geiger as follows: general damages for the loss of consortium, $18,000.00; emotional distress, $35,000.00. The total judgment entered in favor of the Plaintiffs and against Dr. Geiger was $355,040.00.

Dr. Geiger moved to Saint Louis and on March 16, 1989, filed a petition for protection under Chapter 7 of the Bankruptcy Code. Dr. Geiger's only substantial debts are those he owes the Kawaauhaus.

DISCUSSION

This case requires the Court to interpret and apply section 523(a)(6) of the Bankruptcy Code. Section 523(a)(6) denies a

debtor the discharge of any debt "for willful and malicious injury by the debtor to another entity ..." 11 U.S.C. § 523(a)(6) (1989). Courts that have considered this exception to discharge have disagreed on its meaning. As one authority summarized the situation, courts have split "as to whether the statute requires an intentional act that results in injury (FN3) or an act with intent to cause injury." (FN4) *Perkins v. Scharffe*, 817 F.2d 392 (6th Cir. 1987).

The Eighth Circuit considered the meaning of "willful and malicious" as the term is used in section 523(a)(6) in *In re Long*, 774 F.2d 875 (8th Cir. 1985). *In re Long* involved a debtor who intentionally violated the terms of a security agreement by using the proceeds of certain accounts receivable, in which a creditor held a security interest, to fund an unsuccessful reorganization rather than depositing them in a collateral account as the security agreement required. *Id.* at 876. In other words, the *Long* debtor acted intentionally in misusing the proceeds but in so acting he did not intend to harm his creditor. The creditor who held the security agreement brought an adversary proceeding asking the court to deny discharge of the debt owed to it on the ground that the debtor willfully and maliciously injured the creditor by acting contrary to the security agreement.

The Circuit Court observed that "malice and willfulness are two different characteristics." *Id.*, at 880-81. In order to give meaning- to malice, independent of willful, the Court determined that "only conduct more culpable than that which is in reckless disregard of the rights of creditors' economic interests and expectancies" triggers § 523(a)(6)'s exception to discharge. *Id.* at 881. Seeking to articulate a "workable standard" for denying discharge under section 523(a)(6), the Court looked for guidance to the Restatement (Second) of Torts § 8A, Comment b, which qualifies its definition of intentional harm with a requirement that the expected harm be "certain or substantially certain to occur." (FN5) *Id.* The Eighth Circuit held that, in the

context of breached security agreements, dischargeability under section 523(a)(6) turns upon "whether the conduct is (1) headstrong and knowing (willful) and, (2) targeted at the creditor (malicious), at least in the sense that it is certain or almost certain to cause financial harm." *Id.* at 881.

Applying its stated "working standard", the Circuit Court found that Long had willfully and flagrantly breached the contract he had with his secured creditor. However, because Long had testified that his actions were designed to save his company and not to harm his secured creditor, the Circuit declined to find error in the lower courts' determinations that Long had not acted maliciously, as that term is used in section 523(a)(6). 774 F.2d at 882.

The Eighth Circuit considered dischargeability under section 523(a)(6) in the context of a personal injury debt in *In re Hartley*, 874 F.2d 1254 (8th Cir. 1989). (en banc). The personal injury debt in that case arose when Hartley, the owner of a tire service and auto parts shop, told an employee to clean and paint old tires with gasoline and tire black. *In re Hartley*, 75 B.R. 165, 166 (Bankr.W.D.Mo. 1987), *aff'd 100* B.R. 477 (W.D.Mo. 1988), *and rev'd* 869 F.2d 394 (8th Cir. 1989) *and rev'd on reh'g* 874 F.2d 1254 (8th Cir. 1989) (en banc). The employee, pursuant to Hartley's instructions, went to the basement of the shop and began treating the tires. 75 B.R. at 166. Hartley, as a practical joke, threw a firecracker into the basement where his employee was working. *Id.* Fumes had collected in the poorly ventilated basement and the firecracker caused an explosion which severely injured the employee. *Id.*. The employee brought a personal injury suit against Hartley in state court and Hartley filed bankruptcy shortly thereafter. (FN6) *Id.* The employee/plaintiff objected to the discharge of any liability Hartley owed him and the Bankruptcy Court held the employee's claim to be nondischargeable under § 523(a)(6). *Id.*

The Bankruptcy Court, in its *Hartley* decision, noted that the defendant:

> knew of the possible consequences, the present dangers, and the potential hazards of his acts. His only excuse was that he did not intend for the gasoline to explode or to burn the plaintiff. Such sanguine hopes and lack of appreciation for the almost inevitable results of his deliberate act cannot avoid the malicious requisite so displayed.

In re Hartley, 75 B.R. at 166 (emphasis added). The District Court affirmed the Bankruptcy Court's decision.

A panel of the Circuit Court reversed the District Court, holding that as the statute [11 U.S.C. § 523(a)(6)] was written by Congress, it is the injury to the creditor which must have been intentional--not the action of the debtor which caused the accident." 869 F.2d at 395. The Eighth Circuit reheard the case en banc and an equally divided court affirmed the decision of the District Court.

After the *Hartley* decision, courts in the Eighth Circuit faced with applying section 523(a)(6) seem to have two interpretations of "willful and malicious" to choose from; one requiring a specific intent to injure the creditor, to be applied to liabilities arising in the context of security agreements and, one requiring a less specific intent to be used in the context of personal injury liabilities. A debt which flows from a medical malpractice action does not fit squarely within either category.

Though courts in the Eighth Circuit have yet to address the dischargeability of a debt arising from medical malpractice, other courts have confronted this issue. *Perkins*, 817 F.2d 392 (6th Cir. 1987), *In re Strybel*, 105 B.R. 22 (9th Cir. BAP 1989), *In re Cole*, 136 B.R. 453 (Bankr.N.D.Tex.1992).

The Bankruptcy Court for the Northern District of Texas recently applied § 523(a)(6) to deny the discharge of a debt

representing a medical malpractice judgement against a debtor. *In re Cole*, 136 B.R. 453 (Bankr.N.D.Tex.1992). The *Cole* court applying the Fifth Circuit's interpretation of § 523(a)(6), found that Dr. Cole's erroneous removal of a nerve from a patient's hand during a ligament reconstruction operation constituted "a wrongful act done intentionally, which necessarily produce[d] harm and [wa]s without just cause or excuse," and concluded that section 523(a)(6)'s willful and malicious criteria had been satisfied. *Id.* at 457. Among the facts the *Cole* court found were:

> (1) Dr. Cole misrepresented that he had performed ligament reconstruction surgery many times before;
>
> (2) Dr. Cole failed to inform his patient that he had severed another patient's nerve while attempting the same procedure;
>
> (3) Debtor concealed the fact that Enid Memorial Hospital had revoked his staff privileges;
>
> (4) Dr. Cole, contrary to the testimony of three other doctors, stated that the medial nerve and tendon are five millimeters apart;
>
> (5) After the operation, Dr. Cole altered his pre-surgery notes to suggest that the patient had a nerve problem in his hand before the operation;
>
> (6) Three doctors testified Dr. Cole provided treatment which was below the standard in the community and that debtor was grossly negligent in treating the patient;
>
> (7) Debtor knew it was his duty to distinguish the patient's nerve from his tendon.

Finally, the *Cole* court concluded the "Debtor's conduct amounted to a willful disregard of that which he knew to be his duty and a total disregard of acceptable medical practice thereby constituting 'willful and malicious' conduct under § 523(a)(6)." *Id.* at 459.

The Sixth Circuit has applied Section 523(a)(6) to a debt which arose from a consent judgement in a medical malpractice case. *Perkins*, 817 F.2d 392 (6th Cir. 1987). In the *Perkins* case the debtor, a podiatrist, unnecessarily injected a patient's foot with an unsterile needle, causing the foot to become infected. The debtor also mistreated the infected foot in that: he failed to perform the proper tests when signs of infection appeared, he did not prescribe the drug of choice following a laboratory analysis, and he failed to hospitalize the patient. *In re Perkins*, 40 B.R. 942 (Bankr.E.D.Mich.1984). The patient brought a medical malpractice suit against Dr. Perkins. Dr. Perkins then filed a Petition under Chapter 7 of the Bankruptcy Code. The parties ultimately negotiated a consent judgement which reserved the question of dischargeability for the bankruptcy court. The Sixth Circuit held that Dr. Perkins's debt represented by the consent judgement was nondischargeable under § 523(a)(6). The Sixth Circuit reasoned that Debtors' conduct "amounted to a willful disregard of his duty and a complete and total disregard of acceptable medical practice and, therefore, constituted willful and malicious conduct." 817 F.2d at 394.

A third court, the Ninth Circuit Bankruptcy Appellate Panel, has applied section 523(a)(6) to a debt that arose in a medical malpractice context. *In re Strybel*, 105 B.R. 22 (9th Cir. BAP 1989). In that case, Dr. Strybel, a psychologist, treated a Mrs. Romano for depression over a period of approximately seven months. One night, Mrs. Romano called Dr. Strybel and visited his home. Dr. Strybel told Mrs. Romano that their doctor/ patient relationship would end if she decided to stay at his house. Mrs. Romano resided at Dr. Strybel's home for the next five weeks during which time Dr. Strybel and Mrs. Romano had sexual intercourse. After Mrs. Romano moved in with Dr. Strybel, her psychotherapy sessions with him ceased. Mrs. Romano ultimately left Dr. Strybel and returned to her husband. The Romanos wrote to Dr. Strybel and demanded $600,000.00 in damages from the doctor for his conduct with Mrs. Romano. The Romanos

later agreed to release Dr. Strybel from all liability in exchange for $350,000.00; $100,000.00 to be paid in cash and $250,000.00 to be paid through an unsecured promissory note. Dr. Strybel paid the Romanos the cash but defaulted on the note after making three payments and the Romanos obtained a state court judgement for the $172,000.00 balance. After Dr. Strybel filed for bankruptcy protection, the Romanos objected to the discharge of the debt owed to them claiming that section 523(a)(6) barred its discharge.

The Ninth Circuit's Bankruptcy Appellate Panel held, with little discussion, that Dr. Strybel's actions were not malicious so as to render his obligation under the promissory note nondischargeable under section 523(a)(6). *Id.* at 24. The panel distinguished *Perkins*, stating that Dr. Strybel's conduct "differed significantly" from the podiatrist's. *Id.* (FN7)

The *Cole*, *Perkins* and *Strybel* decisions convince this court that section 523(a)(6) bars the discharge of the debts Dr. Geiger owes to the Kawaauhaus. Far from standing for the proposition that section 523(a)(6) bars the discharge of all debts based upon a debtor's medical malpractice, those cases equate section 523(a)(6)'s malicious component with egregious behavior, utter incompetence or a total disregard for medical standards. Here, Dr. Geiger's treatment of Mrs. Kawaauhau was so far below the standard level of care that it can be categorized as willful and malicious conduct for dischargeability purposes.

Dr. Halford cited not one, but five decisions Dr. Geiger made during the course of his treating Mrs. Kawaauhau which, in his opinion, constituted substandard care. Some of the errors Dr. Geiger made, like his initial misdiagnosis of Mrs. Kawaauhau's condition, do not seem to have been uncorrectable and, in that sense, not too serious a deviation from medical norms. Other decisions Dr. Geiger made while treating Mrs. Kawaauhau, for example, administering Penicillin orally because that mode of

delivery costs less than intravenous delivery despite the possible consequences of not delivering enough medicine to the injured area, offends even a person lacking formal medical training. In fact, Dr. Geiger admitted at the state court trial that he knew that intravenous Penicillin was the proper prescription for Mrs. Kawaauhau but he opted for the less costly treatment of orally administered Penicillin.

Dr. Halford also stated that Dr. Geiger's decisions: to treat Mrs. Kawaauhau with Tetracycline, to not prescribe Penicillin for Mrs. Kawaauhau after receiving the laboratory analysis of the bacteria in her leg, and to discontinue treating Mrs. Kawaauhau with antibiotics on January 7, 1983 were decisions that caused Mrs. Kawaauhau to receive substandard care. The Court finds that the repeated errors Dr. Geiger made in treating Mrs. Kawaauhau evidence the same "disregard of acceptable medical practice" with which the debtors in *Cole* and *Perkins* acted. Dr. Geiger's egregious errors of judgement led to the worsening of Mrs. Kawaauhau's condition and to the eventual amputation of part of her leg. The damage, awards based upon the state court malpractice action against Dr. Geiger are, therefore, nondischargeable under section 523(a)(6). (FN8)

An Order consistent with this Memorandum Opinion will be entered this date.

ORDER

For the reasons stated in the Memorandum Opinion issued this date, IT IS ORDERED that:

1. the debt Dr. Geiger owes to Margaret Kawaauhau based on a judgement issued from the Circuit Court of the Third Circuit, State of Hawaii as follows: special damages, $203,040.00; general damages; $99,000.00 IS NONDISCHARGEABLE; and

2. the debt Dr. Geiger owes to Solomon Kawaauhau based on a judgement issued from the Circuit Court of the Third Circuit,

State of Hawaii as follows: general damages for the loss of consortium, $18,000.00, emotional distress, $35,000.00 IS NONDISCHARGEABLE.

FN1. Mrs. Kawaauhau denied ever having discussed the cost of treatment with Dr. Geiger. Solomon Kawaauhau, Margaret's husband, testified that he never told Dr. Geiger to keep costs to a minimum in treating Margaret's leg.

FN2. He defined substandard care as, "I mean that care rendered that particular patient was below the standard of care for the community in which that physician practices."

FN3. See *Perkins*, 817 F.2d 392 (6th Cir.1987); *In re Cecchini*, 780 F.2d 1440 (9th Cir.1986); *Matter of Quezada*, 718 F.2d 121 (5th Cir.1983) (holding that the court will infer the intent to harm or injure when the necessary result of a wrongful, deliberate act of the debtor causes injury).

FN4. See *In re Compos*, 768 F.2d 1155 (10th Cir. 1985) ("[s]ection 523(a)(6) does not except from discharge intentional acts which cause injury; it requires instead an intentional or deliberate injury." *Id.* at 1158. (cite omitted)).

FN5. Section 8A of the Restatement of Torts 2d defines "intent" as "denot[ing] that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Comment b to that section adds "Intent is not, however limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965).

FN6. The Bankruptcy Court noted that:

(a) the estimated liability Hartley owed his employee constituted 97 % of all his listed obligations;

(b) the total of all debts, other than the potential debt Hartley owed his employee, was $30,648.16;

(c) Hartley and his wife took home roughly $2000.00 each month; and

(d) Hartley reaffirmed all his secured debts.

From these facts, the Bankruptcy Court concluded that the sole purpose for Hartley's filing was to eliminate the debt he owed to his employee.

FN7. The panel also distinguished Dr. Strybel's case from *In re Franklin*, 726 F.2d 606 (10th Cir.1984). *Franklin* involved a physician who incurred financial liability for medical malpractice when he prescribed anesthesia without investigating the patient's history, over-induced the patient with anesthesia and then tried to cover-up the records documenting his errors. In a later bankruptcy proceeding, Dr. Franklin's medical malpractice liability was held to be nondischargeable under section 17 of the Bankruptcy Act, which like section 523(a)(6) of the Code, referred to debts arising from the "willful and malicious" conduct of the debtor. The Tenth Circuit affirmed the decision of the Bankruptcy Court, finding the doctor's actions to be willful and malicious because he "intended the acts that he did perform, which acts performed in the manner and under the conditions present in this particular situation necessarily resulted in the injury." *Id.* at 610. The *Strybel* panel held that Dr. Strybel's acts were "simply not comparable to" the behavior of the physician in *Franklin*. 105 B.R. at 24. The Tenth Circuit has limited *Franklin's* holding to cases decided under the Bankruptcy Act. *In re Thurman*, 901 F.2d 839, 841 (10th Cir.1990).

FN8. The Tenth Circuit's *Franklin* decision, and its mechanical application of section 523(a)(6)'s predecessor leads to a

rule that any debt based upon medical malpractice is not dischargeable in bankruptcy. *In re Franklin*, 726 F.2d 606 (10th Cir. 1984). This Court does not, today, adopt, the idea that section 523(a)(6), *per se*, bars the discharge of debts based upon medical malpractice, instead, we hold that the Debtor's conduct in treating Mrs. Kawaauhau was so far below the accepted level of care that it constitutes willful and malicious conduct.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

U.S. Bankruptcy Case No.
89-41062-293

Chapter 7 Proceeding

Cause No. 4:94CV2047 JCH

IN RE:

PAUL W. GEIGER,
Debtor.

PAUL W. GEIGER,
Appellant,

v.

MARGARET KAWAAUHAU and SOLOMON KAWAAUHAU,
Appellees.

MEMORANDUM AND ORDER

This matter is before the Court on the appeal of Debtor Paul W. Geiger from the Bankruptcy Court's Order that the debt owed to Margaret Kawaauhau and Solomon Kawaauhau is nondischargeable. Both parties have briefed the issues, and the Court finds that oral argument is not needed for disposition of the appeal. Bankr. R. 8012. On appellate review of a bankruptcy order, the District Court may not overturn factual findings unless they are clearly erroneous; conclusions of law are reviewed de novo. *United States v. Olson*, 4 F.3d 562, 564 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 636 (1993); Bankr. R. 8013.

Debtor filed his voluntary petition under Chapter 7 of the Bankruptcy Code on March 16, 1989. Appellees Margaret and Solomon Kawaauhau filed the complaint in the case below seeking to deny discharge of the debts Dr. Geiger owed them as a result of a state court malpractice judgment. The only significant debt of record is the debt from the state malpractice action that is the subject of this appeal.

Dr. Geiger treated Mrs. Kawaauhau from 1977 to 1983 for various problems. In January 1983, Mrs. Kawaauhau came to Debtor after dropping a box on her right foot. Her leg was swollen, and pus oozed from beneath the nail of her big toe.

Debtor diagnosed Mrs. Kawaauhau with Thrombophlebitis, rather than an infection, and admitted her to the hospital. The resulting numerous errors in Mrs. Kawaauhau's treatment led to a malpractice suit by Mr. and Mrs. Kawaauhau against Debtor. The Kawaauhaus won judgments against him totalling $355,040.00, which Debtor seeks to have discharged.

FACTS

The record reveals the following facts. After admitting Mrs. Kawaauhau to the hospital, Debtor prescribed oral doses of Tetracycline in addition to thrombophlebitis treatment. Blood tests performed after she was admitted showed a "left shift" in Mrs. Kawaauhau's blood. Her treatment was not changed. On her second day in the hospital, Mrs. Kawaauhau developed a blister on her right leg. On the same day, tests were run on fluid from her blister and the pus from her toe which showed the presence of Gram positive cocci bacteria in pairs. Debtor determined Tetracycline was effective against the bacteria from her toe and continued to prescribe Tetracycline orally.

The following day, January 6, 1983, additional tests determined that beta streptococcus bacteria were present in Mrs. Kawaauhau's system. No change was made in her treatment

until the next day, January 7, 1983, at which point Debtor took her off Tetracycline and began prescribing oral Penicillin. Debtor admitted in the subsequent malpractice suit that he knew oral Penicillin was less effective than intravenous Penicillin, but he prescribed oral Penicillin because Mrs. Kawaauhau wanted to minimize the cost of her treatment.

Debtor went on a business trip the following day, leaving Mrs. Kawaauhau's care to other physicians who treated her with intramuscular Moxam and Penicillin and arranged to fly her to an infectious disease specialist in Honolulu. Debtor returned January 11, 1983, canceled her transfer, and discontinued all antibiotics. Mrs. Kawaauhau did not receive any antibiotics for two days thereafter. Finally, on January 14, 1983, after Mrs. Kawaauhau's leg had deteriorated significantly, surgeons determined her leg needed to be amputated below the knee. Mrs. Kawaauhau subsequently lost her lower right leg to amputation.

Expert testimony of Dr. Peter Halford, a board certified surgeon, showed that Mrs. Kawaauhau received substandard care in the treatment of her leg. Dr. Halford's testimony identified at least six incidents of inadequate care. First, Debtor failed to properly diagnose Mrs. Kawaauhau's condition as an infection, even though pus oozed from her toe. Second, Debtor should not have administered Tetracycline to Mrs. Kawaauhau because it is not particularly effective against the type of infection she had, and it poses a risk to individuals who, like Mrs. Kawaauhau, have kidney problems. Third, Debtor failed to prescribe Penicillin when the bacteria was first identified: Penicillin is quite effective against such bacteria, and Tetracycline is not. Fourth, when Debtor did begin prescribing Penicillin he should have administered it intravenously rather than orally. Fifth, Debtor discontinued all antibiotics on January 11, 1983. Finally, Debtor canceled Mrs. Kawaauhau's transfer to Honolulu.

Dr. Halford's deposition testimony, admitted without objection as evidence in the case below, indicated that Penicillin was

proper for the type of infection Mrs. Kawaauhau had and that Tetracycline was not. His deposition testimony further indicated that by giving Penicillin orally rather than intravenously, the level of Penicillin in the blood could not reach the level required to address Mrs. Kawaauhau's life-threatening infection. Dr. Halford further indicated in his deposition that because Mrs. Kawaauhau was provided with substandard care, the infection progressed at a much more rapid rate and more viciously than it otherwise would have, resulting in amputation of her lower right leg.

ANALYSIS

In determining whether the debt to Appellees is dischargeable the Bankruptcy Court determined pursuant to 11 U.S.C. § 523(a)(6) that Debtor willfully and maliciously injured the Appellees. Appellant argues that the Bankruptcy Court used the wrong legal standard. The Bankruptcy Judge applied the standards set out in *In re Long*, as they were set forth in a personal injury case, *In re Hartley*, 75 B.R. 165 (Bankr. W.D. Mo. 1987), *aff'd* 100 B.R. 477 (W.D. Mo. 1988), *rev'd* 869 F.2d 394 (8th Cir. 1989), *rev'd on reh'g* 874 F.2d 1254 (8th Cir. 1989) (en banc).

The Eighth Circuit does not appear to have ruled on the dischargeability of medical malpractice judgments under Chapter 7 of the Bankruptcy Code. It has, however, set out a test for applying the willful and malicious standard of the statute. *See In re Long*, 774 F.2d 875 (8th Cir. 1985) (holding debtor who intentionally violated the terms of a security agreement did not intend to harm his creditor). "When transfers in breach of security agreements are in issue, we believe nondischargeability turns on whether the conduct is (1) headstrong and knowing ('willful') and, (2) targeted at the creditor ('malicious'), at least in the sense that the conduct is certain or almost certain to cause financial harm." *Id.* at 881.

Extrapolating that test to the instant case, this Court looks at whether the debtor's actions were headstrong and knowing, and whether Debtor's conduct was intended to cause physical harm, or was certain or substantially certain to cause such harm. Debtor admitted that he knew he was providing Mrs. Kawaauhau with substandard care when he prescribed oral Penicillin, yet he did not provide the proper treatment. Debtor's admission satisfies the first part of the test--that his conduct was willful. Therefore, this Court is left with the malicious prong of the test. Appellees have made no showing that Debtor subjectively desired to injure Mrs. Kawaauhau. According to expert testimony, however, his conduct was certain or substantially certain to cause physical harm. Treating Mrs. Kawaauhau with oral Penicillin rather than intravenous Penicillin, caused the infection to spread more quickly and become more vicious, making amputation necessary to save her life.

CONCLUSION

Debtor knew his treatment was substandard, and his treatment was certain or substantially certain to cause Mrs. Kawaauhau harm. The Bankruptcy Court did not err in determining that the judgment against Debtor was not dischargeable.

The judgment of the Bankruptcy Court is affirmed.

Dated this 10th day of October, 1995.

/s/ Jean C. Hamilton
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

No. 95-3913

In re Paul W. GEIGER,
Debtor.

Paul W. GEIGER,
Appellant,

v.

Margaret KAWAAUHAU and Solomon Kawaauhau,
Appellees.

Submitted June 13, 1996'
,Decided Aug. 14, 1996.
Rehearing En Banc Granted;
Opinion and Judgment Vacated Oct. 18, 1996.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Dr. Paul Geiger appeals the judgment of a district court affirming a bankruptcy court's order refusing to discharge his debt to Margaret and Solomon Kawaauhau. We reverse.

I.

The parties do not contest the relevant facts. Mrs. Kawaauhau sought treatment from Dr. Geiger after she injured her foot. Her leg was swollen and pus was discharging from beneath her big toe. Dr. Geiger admitted her to the hospital for treatment for thrombophlebitis and prescribed oral tetracycline. Dr. Geiger ran tests that suggested the presence of an infection, and concluded that continuing the tetracycline would be an effective treatment. He eventually prescribed oral penicillin in place of the tetracycline. (Dr. Geiger testified that he knew that intravenous

penicillin would have been more effective than the oral penicillin, but he prescribed oral penicillin because he understood that Mrs. Kawaauhau wanted to minimize the cost of her treatment.) Dr. Geiger then departed on a business trip and left Mrs. Kawaauhau in the care of other physicians, who began to administer intramuscular penicillin and decided to transfer her to an infectious disease specialist. When Dr. Geiger returned from his trip, however, he canceled the transfer and discontinued all antibiotics because he believed that the infection had run its course. A few days later Mrs. Kawaauhau's condition deteriorated and her leg had to be amputated.

When the Kawaauhaus won an action for malpractice against Dr. Geiger he petitioned for bankruptcy. The Kawaauhaus then filed a complaint requesting the bankruptcy court to deny discharge of the malpractice judgment on the ground that it was a debt "for willful and malicious injury by the debtor." 11 U.S.C. § 523(a)(6). In the bankruptcy court's view, willful and malicious conduct included egregious behavior, utter incompetence, or a total disregard for medical standards. The bankruptcy court credited the opinion of the Kawaauhaus' expert witness, who testified that Mrs. Kawaauhau had received substandard care in the treatment of her leg. In the expert's opinion, moreover, Dr. Geiger's treatment permitted the infection to progress more rapidly than it would have if she had received proper treatment. The bankruptcy court concluded that Dr. Geiger's treatment was so far below the standard level of care as to be willful and malicious, and therefore refused to discharge the malpractice judgment. The district court affirmed the bankruptcy court's decision.

II.

The parties express the belief that the outcome of this case ought to be influenced (indeed, might be controlled) by our holding in *In re Hartley*, 874 F.2d 1254 (8th Cir. 1989) (en banc).

But in *Hartley*, we simply left the result that the district court reached undisturbed because we were evenly divided on the merits of the appeal: We neither approved nor disapproved the district court's judgment, much less the reasoning that supported it. In other words, *Hartley* generated no precedent that would aid in the decision of the case before us.

Although we have not previously ruled on the precise question of whether medical malpractice judgments are dischargeable in bankruptcy, we have held that conduct that is merely reckless is not malicious within the meaning of the statute. *See Cassidy v. Minihan*, 794 F.2d 340, 344 (8th Cir.1986); *In re Long*, 774 F.2d 875, 880-81 (8th Cir. 1985). We have expressed the belief that Congress intended "to allow discharge of liability for injuries unless the debtor intentionally inflicted an injury." *Cassidy*, 794 F.2d at 344. As a result, we found that a judgment for injuries caused by the debtor's drunk driving was dischargeable because the debtor was, at most, guilty of reckless conduct. *Id.*

Although it is certainly true that the record supports the conclusion that Dr. Geiger's treatment of Mrs. Kawaauhau was at the very least negligent, the bankruptcy court erred when it concluded that his conduct was willful and malicious. We believe that on the record before us the worst thing that can be said about Dr. Geiger is that he acted recklessly in treating Mrs. Kawaauhau with relatively inexpensive antibiotics that were not as effective as more expensive ones, or in discontinuing antibiotics when he thought that the infection had run its course. The evidence showed only that Dr. Geiger failed to save Mrs. Kawaauhau's leg from the ravages of an infection, not that he intended to harm her. In other words, his efforts to treat Mrs. Kawaauhau were not calculated to result in the loss of her leg, and were therefore not malicious. The judgment debt is therefore properly dischargeable in bankruptcy.

III.

For the foregoing reasons, we reverse the judgment of the district court affirming judgment of the bankruptcy court.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

No. 95-3913

In re Paul W. GEIGER,
Debtor.

Paul W. GEIGER,
Appellant,

v.

Margaret KAWAAUHAU and Solomon Kawaauhau,
Appellees.

Submitted January 14, 1997
Decided May 14, 1997

Before ARNOLD, Chief Judge, and McMILLIAN, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

This case raises the question whether a judgment debt resulting from a medical malpractice action is dischargeable in bankruptcy. The Kawaauhaus maintain that it is not, because it is a "debt . . . for willful and malicious injury by the debtor," which 11 U.S.C. § 523(a)(6) exempts from discharge. The bankruptcy court agreed with the Kawaauhaus, see In re Geiger, 172 B.R. 916, and the district court affirmed that judgment in an unpublished opinion. On further appeal, a unanimous panel of this court reversed, relying on Cassidy v. Minihan, 794 F.2d 340 (8th Cir.1986). The panel observed that the worst that might even colorably be said of the debtor's behavior was that it was reckless, and that since there was no evidence that he intended to

harm his patient, it was not possible to say that his actions were either willful or malicious, much less both. See In re Geiger, 93 F.3d 443 (8th Cir.1996).

We granted the Kawaauhaus' subsequent suggestion for rehearing en banc, and we reverse the judgment of the district court.

I.

Mrs. Margaret Kawaauhau sought treatment from Dr. Paul Geiger after she injured her foot. He admitted her to the hospital for treatment for thrombophlebitis, ran tests that suggested the presence of an infection, and concluded that continuing the oral tetracycline that he had already prescribed would be an effective treatment for her condition. He eventually prescribed oral penicillin in place of the tetracycline. Dr. Geiger then departed on a business trip, leaving his patient in the care of other physicians, who began to administer intramuscular penicillin and decided to transfer her to an infectious disease specialist. When Dr. Geiger returned from his trip, however, he discontinued all antibiotics because he believed that the infection had run its course. A few days later, Mrs. Kawaauhau's condition deteriorated and her leg had to be amputated below the knee. When the Kawaauhaus succeeded in an action for malpractice against Dr. Geiger, he petitioned for bankruptcy.

In an effort to prove that the malpractice judgment was not a dischargeable debt, the Kawaauhaus introduced into evidence before the bankruptcy court certain portions of the transcript of the trial of the malpractice action. The transcript revealed that Dr. Geiger had admitted at trial that the proper treatment for the streptococcus infection with which he was faced was intravenous penicillin, that he knew that at the time, but that he had nevertheless administered the penicillin orally partly because his patient had frequently complained about medical expenses (he had been treating her for a number of years) and had specifically

expressed a desire to avoid costly medicines. In response to a direct question about whether he acknowledged that intravenous penicillin was "the proper standard of care in the circumstances," Dr. Geiger answered that he did.

The Kawaauhaus, without objection from Dr. Geiger, also introduced into evidence before the bankruptcy court the deposition of Dr. Peter Halford, a physician hired to examine both Mrs. Kawaauhau's medical records and Dr. Geiger's testimony in the original trial and to render expert opinions based on them. In his deposition, Dr. Halford first offered his opinion that Dr. Geiger's treatment of Mrs. Kawaauhau had been negligent in at least four particulars: He had initially misdiagnosed her condition as phlebitis, or inflammation of the veins in her leg, rather than as an infection; he had initially given her the wrong antibiotic (tetracycline instead of penicillin); he had started penicillin too late, and then had administered it by mouth rather than intravenously; and he had stopped administering all antibiotics for a time. But Dr. Halford agreed with counsel that Dr. Geiger's most egregious error was that he had considered the relative costs of administering oral and intravenous penicillin in deciding which treatment to choose. It is mainly on the foundation of this last exchange that the Kawaauhaus have erected their theory that Dr. Geiger acted willfully and maliciously, because, the argument runs, he intentionally rendered substandard care to Mrs. Kawaauhau, an act, the Kawaauhaus say, that necessarily led to her injury. "It is this intentional substandard treatment of the plaintiff," the Kawaauhaus said before the bankruptcy court, "in conjunction with the other misfeasance, that is the crux of our case."

Whether, in forming his opinion concerning the propriety of Dr. Geiger's treatment, Dr. Halford believed that Mrs. Kawaauhau had requested that Dr. Geiger cut costs, Dr. Halford did not say, and the bankruptcy court made no finding on the matter. Dr. Halford observed only that "cost certainly plays a role in what we

choose if we have an alternative that is more economically feasible, but cost should have no role in directing our therapeutic efforts when you are dealing with life and death." Dr. Halford then reviewed the portion of Dr. Geiger's trial testimony in which he admitted knowing, "in fact, that intravenous penicillin was the appropriate standard of care for this type of problem and yet he intentionally used something that was less effective for the sake of cost." Dr. Halford ended his deposition by agreeing with the Kawaauhaus' lawyer that "Dr. Geiger intentionally administered substandard care to Margaret Kawaauhau that necessarily resulted in advancing infection in her leg, then loss of her leg, and permanent damage to her kidneys."

The bankruptcy court, though it did not say so directly, evidently credited everything that Dr. Halford said in his deposition, and concluded that "Dr. Geiger's treatment of Mrs. Kawaauhau was so far below the "standard level of care that it can be categorized as willful and malicious conduct for dischargeability purposes." In re Geiger, 172 B.R. 916, 923 (Bankr.E.D.Mo.1994). The bankruptcy court further opined that in the context Dr. Geiger's consideration of costs "offends even a person lacking formal medical training." Id. In affirming the judgment of the bankruptcy court, the district court, relying on our opinion in In re Long, 774 P.2d 875 (8th Cir.1985), indicated its belief that Dr. Geiger's admission that "he knew he was providing Mrs. Kawaauhau with substandard care when he prescribed oral penicillin" rendered his conduct willful, and the fact that "his conduct was certain or substantially certain to cause physical harm" rendered it malicious within the meaning of the relevant provision of the bankruptcy code.

II.

We begin our consideration of this evidence by admitting to some uneasiness about the procedure employed in the bankruptcy court. The complaint before the bankruptcy court sought

to have a judgment debt declared nondischargeable because, in the words of the statute, it was a "debt ... for willful and malicious injury." See 11 U.S.C. § 523(a)(6). The relevant judgment was entered, and thus the debt was necessarily predicated on, a jury verdict that was in turn based on evidence presented at a trial. The parties did not furnish us with a copy of the trial transcript, and we are thus unable to know what testimony the jury heard that might have convinced it that Dr. Geiger had committed medical malpractice. We therefore find it hard to understand how we can decide what conduct the verdict, and thus the "debt," was "for" within the meaning of the statute. We wonder about the propriety of going behind the pleadings in the original malpractice action, which asked for damages for Dr. Geiger's negligence, to decide what this "debt" was "for." (Plaintiffs prayed for punitive damages, but the issue was not submitted to the jury.) Even if the trial transcript contained particularly shocking evidence of gross negligence and recklessness, or even of intent to injure, we would have no way of knowing what testimony the jury credited, what their verdict was supported by, and therefore what the "debt" under consideration was "for."

[1] Dr. Geiger, however, does not raise these difficulties on appeal, and we leave them to another day, because we are of the view that the evidence before the bankruptcy court, even when viewed in a light most favorable to the Kawaauhaus, cannot make this debt one that is "for willful and malicious injury by the debtor," as the statute requires. See 11 U.S.C. § 523(a)(6).

This phrase has a long history. It was part of the Bankruptcy Act as early as 1898, and in Tinker v. Colwell, 193 U.S. 473, 481, 490, 24 S.Ct. 505, 506- 07, 48 L.Ed. 754 (1904), Mr. Justice Peckham gave it an expansive reading, leading to a holding that a judgment based on a husband's complaint for criminal conversation (adultery) was not dischargeable. Despite the debtor's argument that in order to be malicious his action had to have evidenced ill will toward the husband, the Court held that it was

unnecessary under the statute for the debtor to have acted with "personal malevolence toward the husband." Id. at 485, 24 S.Ct. at 508. It was enough (that is, the statute was satisfied) if the debtor had committed " 'a wrongful act, done intentionally, without just cause or excuse.'" Id. at 486, 24 S.Ct. at 508, quoting Bromage v. Prosser, 4 Barn. & Cres. 247, 255, 107 Eng.Rep. 1051, 1054 (K.B.1825). In order for an act to be willful, it was, according to the Court, necessary only that it be intentional and voluntary. Tinker, 193 U.S. at 486, 24 S.Ct. at 508-09. The obstacle erected by the statutory exception to discharge was therefore not nearly so formidable for a judgment creditor as a first reading of it might have made it appear. All that the creditor had to show was that the debtor had intentionally committed a wrongful act that was unjustified and unexcused. (How a wrongful act could ever be anything but unjustified, the Court did not explain.)

When the bankruptcy code was revised in 1978, the words of the exception to discharge under consideration in this case remained unchanged, but both the United States Senate and the United States House of Representatives, in reenacting what is now 11 U.S.C. § 523(a)(6), observed in legislative reports that they intended the word "willful" to mean "deliberate or intentional," and stated specifically that to "the extent that Tinker v. Colwell ... held" that a "less strict" (Senate), or "looser" (House), "standard is intended ... [it is] overruled." See S.Rep. No. 95-989 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, and H.R.Rep. No. 95-595 (1977), reprinted in 1978 U.S.C.C.A.N. 5963. Both houses of Congress also specifically stated that it was their intention to overturn any cases that had applied "a 'reckless disregard' standard" in deciding what debts were not dischargeable. Id. Not all of the cases that we have decided after the revision have focused very precisely on the exact meaning of this new appreciation of what debts the bankruptcy code protects from discharge. See, e.g., In re Long, 774 F.2d 875 (8th Cir. 1985). But in Cassidy v. Minihan, 794 F.2d 340, 344 (8th Cir.1986), our court, after a consideration of the legislative history of the revised act, held that Congress had intended to "allow discharge of liability for injuries unless the debtor intentionally inflicted an injury."

[2][3] The Sixth Circuit has put the question that is before us this way: Do the words "deliberate or intentional," contained in the legislative reports referred to above, require an "intentional act that results in injury" or "an act with intent to cause injury" before a judgment debt can be exempt from discharge? Perkins v. Scharffe, 817 F.2d 392, 393 (6th Cir.1987), cert. denied, 484 U.S. 853, 108 S.Ct. 156, 98 L.Ed.2d 112 (1987). Posed this way, we think that the question virtually answers itself. We do not hesitate to adopt the latter construction, because we believe that it is the more natural way to interpret the relevant words. For one thing, the word "intentional," by itself, will, almost as a matter of natural reflex, cause a lawyer's mind to turn to that category of wrongs known as intentional torts, a category that excludes injuries caused by acts that are merely negligent, grossly negligent, or even reckless. We presume that when Congress uses a word that has a fixed, technical meaning, it has used it as a term of art. Second, the word "wilful" in the statute (which Congress has said means "deliberate or intentional") modifies the word "injury," so that what is required for nondischargeability is a deliberate or intentional injury, not merely a deliberate or intentional act. We think it fair to conclude that this means a deliberate or intentional invasion of the legal rights of another, because the word "injury" usually connotes legal injury (injuria) in the technical sense, not simply harm to a person.

Adopting the alternative construction, moreover, would render virtually all tort judgments exempt from discharge. Every act that is not literally compelled by the physical act of another (as when someone seizes my arm and causes it to strike another), or the result of an involuntary muscle spasm, is a "deliberate or

intentional" one, and if it leads to injury, a judgment debt predicated on it would be immune from discharge under the alternative construction of the statute that is posed in Perkins. Indeed, we see no reason that a knowing breach of contract would not result in a judgment that would be exempt from discharge under this legal principle. Surely this proves too much. A person who deliberately and intentionally turns the wheel of an automobile to make a left-hand turn without looking up to see if traffic is coming the other way, an act very likely to lead to injury, however foolish or even reckless he or she may be, simply cannot fairly be described as committing an intentional tort.

[4] We therefore think that the correct rule is that a judgment debt cannot be exempt from discharge in bankruptcy unless it is based on what the law has for generations called an intentional tort, a legal category that is based on "the consequences of an act rather than the act itself." Restatement (Second) of Torts § 8A, comment a, at 15 (1965). Unless the actor "desires to cause consequences of his act, or ... believes that the consequences are substantially certain to result from it," he or she has not committed an intentional tort. Id. § 8A at 15.

In our case, there is no suggestion whatever that Dr. Geiger desired to cause the very serious consequences that Mrs. Kawaauhau suffered. So much is conceded. If, therefore, he was an intentional tortfeasor as we have defined that term, he would have to have believed that Mrs. Kawaauhau was substantially certain to suffer harm as a result of his actions. Although the district court opined that "expert testimony" established that Dr. Geiger's conduct was "certain or substantially certain to cause physical harm," that is not enough. There is nothing in the record, so far as we can tell, that would support a finding that Dr. Geiger believed that it was substantially certain that his patient would suffer harm. Indeed, he testified that he believed that Mrs. Kawaauhau was absorbing the penicillin that she was taking orally well enough to effect a cure.

Dr. Halford, moreover, never testified, except in response to a very leading question, that the harm that "Mrs. Kawaauhau suffered was a substantially certain consequence of Dr. Geiger's course of treatment. What Dr. Halford said in the main portion of his testimony was that it was a necessary result of that treatment that the infection would "progress at a much more rapid rate and more viciously than otherwise." He also said that, in this case, the treatment "resulted in her requiring amputation to save her life and in permanent kidney damage," but he did not say that that was a necessary result of the treatment, only, as we understand the testimony, a result of the progress of the infection. We suspect that the course and consequences of an infection are notoriously difficult to predict, but even if Dr. Halford had testified that Dr. Geiger's treatment necessarily (that is, inevitably) led to Mrs. Kawaauhau's injuries, plaintiff's proof still falls short of the mark. As we have indicated, the real question is whether Dr. Geiger believed that these consequences were substantially certain to occur at the time that he attempted his treatment, and the record simply will not support the conclusion that he did. This is an important distinction, one in fact that defines the boundary between intentional and unintentional torts: Even if Dr. Geiger should have believed that his treatment was substantially certain to produce serious harmfill consequences, he would be guilty only of professional malpractice, not of an intentional tort.

In the case before us, as our original panel has already noted, "We believe that ... the worst thing that can be said about Dr. Geiger is that he acted recklessly in treating Mrs. Kawaauhau with relatively inexpensive antibiotics that were not as effective as more expensive ones, or in discontinuing antibiotics when he thought that the infection had run its course." In re Geiger, 93 F.3d 443, 444-45 (8th Cir.1996). It is true, as the district court noted, that Dr. Geiger acted deliberately and intentionally when he pursued this course of conduct, but only an elaborate play on words can transform this behavior into something that is willful

and malicious. It is also true that Dr. Geiger testified that he knew that intravenous penicillin was the standard treatment, but a deviation from a standard is not even always negligent, especially if, as may have been the case here, it was induced by the patient herself or Dr. Geiger reasonably believed that it was. Assuming, without deciding, that Mrs. Kawaauhau did urge Dr. Geiger to cut costs, it is perhaps true that he should have attempted to convince her that she was requesting a very foolish, indeed reckless, economy. We express no view on the duty of physicians in such circumstances, because it is unnecessary to a resolution of this case, and because the existence and scope of such a duty will usually be a matter governed by the established law of some state. Whatever the duty, a breach of it would amount only to a negligent failure to live up to professional standards.

We are aware that other circuit courts have reached legal conclusions that are at odds with our holding in this case. See, e.g., Perkins, 817 F.2d at 394, and In re Franklin, 726 F.2d 606, 610 (10th Cir.1984). We believe, however, with respect, that these decisions are not well grounded in the statute because they pay insufficient attention to the legislative history of the relevant statutory provisions. They do not, moreover, give appropriate weight to the well-established interpretational rule that exceptions from discharge are to be strictly construed so as to give maximum effect to the policy of the bankruptcy code to provide debtors with a "fresh start." See, e.g., In re Kline, 65 F.3d 749, 751 (8th Cir.1995), and Werner v. Hofmann, 5 F.3d 1170, 1172 (8th Cir.1993) (per curiam).

Finally, we observe that in this case we hold only that for a judgment debt to be nondischargeable under the relevant statutory provision, it is necessary that it be based on the commission of an intentional tort. We believe, as we have said, that the debtor's conduct cannot otherwise be said to be "willful." We express no view, however, on the question whether it is sufficient

for nondischargeability that the judgment be for an intentional tort. We note in this connection that 11 U.S.C. § 523(a)(6) requires that the injury be both "willful and malicious" before an entitlement to the exception to discharge arises. In In re Long, 774 P.2d at 881, we held that for a creditor to establish that the debtor acted maliciously, it was necessary to show that the debtor's conduct was "targeted at the creditor"; and, since the debtor in that case (though he was an intentional tortfeasor) was not acting with a purpose to harm creditors, we concluded that he was not acting maliciously, id. at 882. Since it is not necessary to a decision in this case that we decide the meaning of the word "malicious" and the bearing, if any, that the interpretation given to that word' might have on the dischargeability of a judgment debt," we have no occasion to discuss the matter, and thus" we venture no opinion on it.

III.

In sum, since it is not even alleged that Dr. Geiger intended to inflict an injury on his patient, and it cannot be said that he believed that an injury was substantially certain to result, the judgment underlying this case could not have given rise to a "debt ... for willful and malicious injury by the debtor," see 11 U.S.C. § 523(a)(6). We therefore reverse the judgment of the district court.

MURPHY, Circuit Judge, with whom McMILLIAN, Circuit Judge, joins, dissenting.

Because the court's reading of 11 U.S.C. § 523(a)(6) goes beyond the language of the statute and its interpretation by other circuit courts, and because it unnecessarily restricts this exception to dischargeability, I respectfully dissent.

Although the court states the question in this case to be whether a medical malpractice judgment debt is dischargeable in bankruptcy, it is more accurately stated to be whether the

particular judgment debt of Dr. Paul Geiger may be discharged. After a jury trial for medical malpractice in Hawaii, the Kawaauhaus obtained valid state judgments against Dr. Geiger in the total amount of $355,040. He left Hawaii and settled in St. Louis. When the Kawaauhaus attempted to collect their judgment in Missouri, Dr. Geiger filed for protection under Chapter 7 of the bankruptcy code. His only significant debt was the state court judgment awarded to the Kawaauhaus. After a hearing, the bankruptcy court found that under § 523(a)(6) Dr. Geiger's debt was not dischargeable because it qualified for exception as a willful and malicious injury. The district court affirmed, concluding that under In re Long, 774 F.2d 875 (8th Cir.1985), the debt was not dischargeable because Dr. Geiger knew his treatment was substandard and that it was certain or substantially certain to cause Mrs. Kawaauhau harm.

The court reverses because it concludes that Dr. Geiger's actions were not willful "even when [the evidence is] viewed in a light most favorable to the Kawaauhaus," but its recitation of the facts and its discussion of them does not reflect adherence to this principle.

The evidence before us comes from the record made in the bankruptcy court. At the bankruptcy court hearing the Kawaauhaus offered four exhibits which were accepted into evidence without objection. These exhibits consisted of evidence from the state trial (portions of the state trial transcript and a report prepared by the Kawaauhaus' expert witness, Dr. Peter Halford, a board certified surgeon), and evidence prepared for the bankruptcy hearing (a deposition and affidavit of Dr. Halford). Dr. Geiger testified at the hearing on his own behalf, but offered no other evidence.

The bankruptcy court made the following findings of facts. On or about January 4, 1983, Mrs. Kawaauhau sought medical treatment from Dr. Geiger. She had been a patient of his in the

past and had numerous medical conditions with which Dr. Geiger was familiar. In this particular instance, she had dropped a box on her right foot, her leg was swollen and red, and pus oozed from beneath the nail of her large toe. She complained of chills, dizziness, pain in the calf, and a fever of 102 degrees the prior evening. She also developed a blister on her right calf. After an initial diagnosis of thrombophlebitis, Dr. Geiger received test results on January 5 and 6 that indicated Mrs. Kawaauhau suffered from a bacterial infection. On January 7, he prescribed oral penicillin. After Dr. Geiger left town on January 8, the doctors who assumed care of Mrs. Kawaauhau immediately started her on intramuscular penicillin and arranged to transfer her to a specialist in Honolulu. When Dr. Geiger returned on January 11, he canceled the scheduled transfer because he thought Mrs. Kawaauhau looked stronger and more alert than when he left, and he also canceled all antibiotics because he thought her infection might be gone, she might develop a superinfection, and her blood was too thin. Her condition deteriorated, and on January 14 the decision was made to amputate her leg below the knee.

Based on his own testimony, the bankruptcy court found that Dr. Geiger knew the proper standard of care for treating an infection like Mrs. Kawaauhau's was intravenous penicillin rather than oral penicillin, and that he knew he was not administering care that met this standard. [FN1] The court also relied on the expert testimony of Dr. Halford that Dr. Geiger's intentional substandard care had caused Mrs. Kawaauhau's infection to progress more rapidly and viciously than it would have otherwise, and that this progression resulted in the amputation of her leg and permanent damage to her kidneys. Dr. Halford expressed the additional opinion that Dr. Geiger had "intentionally administered substandard care to Margaret Kawaauhau that necessarily resulted in advancing infection in her leg, then loss of her leg, and permanent damage to her kidneys. "

FN1. Dr. Geiger testified in the bankruptcy court that his patient's concern about cost prevented him from administering the proper standard of care. In the state trial, both Mr. and Mrs. Kawaauhau denied they expressed any concern about cost to Dr. Geiger, and this testimony was entered into the bankruptcy court record. Dr. Geiger stated twice at the hearing that he never explained to Mrs. Kawaauhau the cost difference between oral and intravenous penicillin. In response to continued questioning by his attorney, he later stated he did not know if he had discussed the cost difference. The bankruptcy court did not make any specific findings about the conflicting evidence on this point.

The court expresses some uncertainty about the proper procedure in a case such as this and whether the focus should be on the state court pleadings or evaluation of the evidence presented to the state jury. A survey of leading cases indicates that sometimes discharge exception issues are resolved by motions for summary judgment. [FN2] See, e.g., In re Zelis, 66 F.3d 205, 208 (9th Cir.1995); In re Walker, 48 F.3d 1161, 1163 (11th Cir.1995). Willfulness and maliciousness are typically resolved in a case such as this, however, after a hearing in the bankruptcy court which may involve additional evidence. See e.g., In re Stelluti, 94 F.3d 84 (2d Cir.1996) (bench trial on dischargeability); In re Stanley, 66 F.3d 664 (4th Cir.1995) (bankruptcy court hearing on whether actions leading to state court judgment were willful and malicious under § 523(a)(6)); In re Thirtyacre, 36 F.3d 697 (7th Cir. 1994) (evidentiary hearing to determine if actions were willful and malicious); In re Conte, 33 F.3d 303 (3d Cir. 1994) (remand for hearing on whether actions underlying state court verdict were willful and malicious under § 523(a)(6)); In re Pasek, 983 F.2d 1524 (10th Cir.1993) (bankruptcy court hearing on willful and malicious); In re Franklin, 615 F.2d 909, 911 (10th Cir. 1980) (bankruptcy court not limited to state court record in making dischargeability determination).

FN2. Some motions seek to bar by collateral estoppel the relitagation of factual and legal issues decided in state court. See Grogan v. Garner, 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 658 n. 1, 112 L.Ed.2d 755 (1991) (collateral estoppel may apply to dischargeability proceedings under § 523(a)); In re Miera, 926 F.2d 741, 743 (8th Cir. 1991). (willful and malicious issue necessarily decided by state court award of punitive damages).

In this case, unlike Miera, the record does not reveal that the issue of whether Dr. Geiger inflicted a willful and malicious injury was decided in the state court action, and that issue is of course different from the issues of whether Dr. Geiger breached the standard of care he owed Mrs. Kawaauhau or caused her injury, both of which would have been essential to the state judgment. See Restatement (Second) of Torts § 328A (1965 and Supp.1996).

The parties here do not challenge the factual findings of the bankruptcy court or the admissibility of the evidence on which it relied. They view the question for this court to be whether the facts found by the bankruptcy court indicate that the injury caused by Dr. Geiger was willful and malicious and whether the judgments assessed against him for that injury is therefore dischargeable. The factual findings of the bankruptcy court are reviewed for clear error, and its legal conclusions are reviewed de novo. In re Central Arkansas Broadcasting Co., 68 F.3d 213, 214 (8th Cir. 1995) (per curiam). I believe a careful review shows that the bankruptcy court's findings are not clearly erroneous and that they are supported in the record.

The statutory provision controlling the question of discharge in this case, 11 U.S.C. § 523(a)(6), bars discharge in bankruptcy of any debt "for willful and malicious injury by the debtor...." If the intent of Congress is clear from the text of the statute, no further inquiry is necessary. Good Samaritan Hosp. v. Shalala,

508 U.S. 402, 409-11, 113 S.Ct. 2151, 2157,124 L.Ed.2d 368 (1993); Arkansas AFL-CIO v. F.C.C., 11 F.3d 1430, 1440 (8th Cir.1993) (en banc). The legislative history is consulted only if that intent cannot be discerned from the plain language. Arkansas AFL-CIO, 11 F.3d at 1440.

The court finds it unnecessary to decide the meaning of "malicious" because of its treatment of "willful." The statute does not define "willful," but when Congress uses a term of art, that term is accorded its established meaning. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342, 111 S.Ct. 807, 810-11, 112 L.Ed.2d 866 (1991). According to Prosser and Keeton, "[t]he usual meaning assigned to 'willful' .... is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow ... W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 34, at 213 (5th ed. 1984). Although the meaning of "willful" can be influenced by its context, in civil actions the word is commonly used for an act which is intentional, knowing, or voluntary, as distinguished from accidental. Screws v. United States, 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495 (1945); United States v. Murdock, 290 U.S. 389, 394, 54 S.Ct. 223, 225, 78 L.Ed. 381(1933). Only when used in a criminal context does it generally mean an act done with bad purpose. Screws, 325 U.S. at 101, 65 S.Ct. at 1035; Murdock, 290 U.S. at 394, 54 S.Ct. at 225.

The Supreme Court has had only one occasion to discuss the meaning of willful and malicious in the statutory section on exceptions to discharge and that was in Tinker v. Colwell, 193 U.S. 473, 24 S.Ct. 505, 48 L.Ed. 754 (1904). In Tinker, the Court interpreted "willful and malicious" in this way:

> a wilful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception.

Id. at 487, 24 S.Ct. at 509. The Kawaauhaus argue that Tinker is still good law because it has never been overruled or modified by any subsequent Supreme Court case, but Dr. Geiger argues that the legislative history of the new bankruptcy code shows Congress intended in it to override Tinker.

In the bankruptcy code enacted in 1978 Congress made no change in the wording of this exception to discharge, but the more than 700 pages of associated committee reports make brief reference to the meaning of § 523(a)(6) See S.Rep. No. 95-989, at 79 (1978), reprinted in, 1978 U.S.C.C.A.N. 5787, 5865, and H.R.Rep. No. 95-595, at 365 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6320-21. The reports comment:

> "[W]illful" means deliberate or intentional . To the extent that Tinker v. Colwell (citation omitted) held that a [looser (House version); less strict (Senate version)] standard is intended, and to the extent that other cases have relied on Tinker to apply a "reckless disregard" standard, they are overruled.

Id. This commentary reveals several things, but also raises additional questions. It indicates that "willful means deliberate or intentional" and that § 523(a)(6) calls for something more than reckless disregard. While it indicates some uncertainty as to what Tinker actually held, any reading of it to mean only reckless disregard is overruled. The commentary does not define a heightened standard, however, or how the words intentional and deliberate should be understood. [FN3]

> FN3. As the Third Circuit has noted:
>
> While this legislative history excludes recklessness [as a definition of "willful"], it does not state exactly what is

required. The bankruptcy courts that have decided this matter have been divided as to whether the statute requires an intentional act that results in injury or an act with intent to cause injury. (Citations and quotations omitted). Moreover, the meaning of either of these two interpretations is not self-evident.

In re Conte, 33 F.3d at 306.

This legislative history does not call for the interpretation adopted today by the court--that Congress intended "willful" to incorporate subjective specific intent to injure and to restrict the application of § 523(a)(6) to intentional torts. In reaching its conclusion, the court relies on the definition of intent found in the Restatement (Second) of Torts § 8A (1965). The court reads this section to mean that intent can only be shown by proof of the subjective desire to injure or the subjective belief that injury is substantially certain to occur, but comment b notes:

> Intent is not ... limited to the consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.

As Judge Becker points out in In re Conte, even if one accepts the Restatement definition as controlling actions which in an objective sense are substantially certain to cause harm can be considered willful and malicious. 33 F.3d at 307-08.

In reenacting the discharge section of the Bankruptcy Act of 1898 in the code adopted in 1978, Congress used terminology in § 523(a)(6) identical to the language interpreted by the Supreme Court in Tinker. Congress could have worded the section to require specific intent to injure or an intentional tort if that was its intent, but it did not. The legislative history also does not do either; it does not mention intentional torts or say what is meant

by "deliberate or intentional." Comments in committee reports do not necessarily control meaning, see, e.g., Pierce v. Underwood, 487 U.S. 552, 567-68, 108 S.Ct. 2541, 2551-52, 101 L.Ed.2d 490 (1988), [FN4] but subsequent to the enactment of the new bankruptcy code courts have tried to conform to the points raised in the legislative history. The variety of formulations which have resulted grow out of the lack of clarity in the committee comments.

> FN4. In Pierce a less restrictive and "naturally conveyed" meaning was adopted rather than one directed by committee comments determined not to be an authoritative expression of the meaning of a phrase. Id. at 565-68, 108 S.Ct. at 2550-52.

No other circuit interprets the statute or the legislative history to require proof of a subjective intent to injure or proof of an intentional tort. [FN5] The court describes its understanding of the statute as the "natural" meaning, with very little reference to the reasoning and analysis of the circuits which have reached different results. Courts draw varying meanings from the use in § 523(a)(6) of the language construed in Tinker and the legislative history behind it. While several other courts recognize evidence of specific intent to injure as one way to meet the statutory standard, none absolutely require it.

> FN5 Even when the acts of the debtor could be characterized as intentional torts, other circuits have not required that a debt result from an intentional tort judgement in order to prevent discharge. See, e.g., In re Stelluti, 94 F.3d at 88; In re Stanley, 66 F.3d at 667-68.
>
> The court is not clear about what its requirement of an intentional tort means. If the intent were to restrict 523(a)(6) to debts resulting from a judgment for an intentional tort, it would add an unprecedented substantive and procedural limitation to this section by requiring parties to obtain a

judgment before initiating an adversary proceeding to prevent discharge. If, on the other hand, the court only means to restrict § 523(a)(6) to conduct that can be characterized as intentional torts, it is inviting parties to litigate state tort actions in the bankruptcy court. For example, in this case, the Kawaauhaus could plausibly argue that Dr. Geiger's actions amounted to battery. See Restatement (Second) of Torts §§ 18-20 (1965).

The First, Third, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits all employ a standard that prevents discharge of a debt if the debtor's act could be predicted to produce the injury suffered by the creditor, but the precise wording of the standard varies. The Sixth Circuit construes willful to apply to an act done intentionally which necessarily produces harm, and malicious to mean wrongful, without just cause or excuse, or excessive. Vulcan Coals, Inc. v. Howard, 946 F.2d 1226, 1228-29 (6th Cir. 1991), (citing Perkins v. Scharffe, 817 F.2d 392, 394 (6th Cir.), cert. denied, 484 U.S. 853, 108 S.Ct. 156, 98 L.Ed.2d 112 (1987)). Similarly, the Ninth Circuit, reading willful and malicious together, requires an act done intentionally that necessarily produces harm without just cause or excuse. In re Zelis, 66 F.3d at 208. The Third Circuit standard for willful and malicious is an act done intentionally which is "substantially certain to result in injury or where the debtor desired to cause injury." In re Conte, 33 F.3d at 308. The Eleventh and Fifth Circuits, like the Third, require proof of an intentional act with the purpose to cause injury or one which is substantially certain to cause injury. In re Delaney, 97 F.3d 800, 802 (5th Cir.1996) (per curiam); In re Walker, 48 F.3d at 1165.

Two circuits use somewhat different terminology, but their focus on the foreseeability of the injury is similar to the examination required by other circuits. In the Tenth Circuit, there will be no discharge if the debtor acts "knowing full well that his conduct will cause particularized injury." In re Pasek, 983 F.2d

at 1527, Creditors "are not restricted to direct evidence of specific intent to injure in satisfying the requirements of § 523(a)(6) ... 'the debtor's actual knowledge or the reasonable foreseeability that his conduct will result in injury to the creditor' are highly relevant." Id. (citations omitted). In the First Circuit, "the term 'wilful and malicious' in § 523(a)(6) means an act intentionally committed, without just cause or excuse, in conscious disregard of one's duty and that necessarily produces an injury." Printy v. Dean Witter Reynolds, Inc., 110 F.3d 853, 859 (1st Cir.1997) (citation omitted).

The standards in the remaining circuits which have ruled on the question vary, but none requires intent to produce the injury. In the Second Circuit the standard requires an intentional and deliberate act which is wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill-will. In re Stelluti, 94 F.3d at 88. In the Fourth Circuit a debtor's injurious act, done deliberately and intentionally, in knowing disregard of the rights of the other, is sufficiently willful and malicious to prevent discharge, even if a debtor bears a creditor no subjective ill will or specific intent to injure. In re Stanley, 66 F.3d at 667. The Seventh Circuit has concluded that § 523(a)(6) does not require specific intent to injure in order to prevent discharge, but it has not developed a definition beyond that. In re Thirtyacre, 36 F.3d at 701.

The only other circuit to rule on the dischargeability of a medical malpractice debt under § 523(a)(6) [FN6] declined to discharge the physician's debt on facts very similar to those in this case. In Perkins the doctor had unnecessarily injected the patient's foot with an unsterile needle, failed to perform timely tests on the resulting infection, subsequently ignored the belated test results, and failed to hospitalize the patient when hospitalization was necessary. The court, citing the leading bankruptcy treatise, employed the standard of "a wrongful act done intentionally, which necessarily produces harm and is without just

cause or excuse" and concluded that it was met by the facts. Perkins, 817 F.2d at 394 (citing 3 Collier on Bankruptcy 523-111 (15th ed. 1986)).

> FN6. The Tenth Circuit has also addressed the dischargeability of a medical malpractice judgment, but that case was applying the "willful and malicious injury" section of the Bankruptcy Act of 1898. See In re Thurman, 901 F.2d 839, 841 (10th Cir. 1990) (discussing In re Franklin, 726 F.2d 606 (10th Cir. 1984)).

Dr. Geiger's debt should similarly not be discharged. It is not necessary in this case to consider whether the Perkins standard or one of the other circuit definitions of willful and malicious is most appropriate in light of the legislative history and policy because even under In re Long the debt is not subject to discharge.

Until today this court's construction of the statute, although more restrictive than some, was generally within the range of interpretations found in other circuits. Many of our previous cases use a standard for § 523(a)(6) which was articulated in In re Long, 774 F.2d at 881. See In re Waugh, 95 F.3d 706, 711 (8th Cir. 1996); In re Miera, 926 F.2d at 743-44. In re Long concluded "willful" meant conduct which was "headstrong and knowing," and "malicious" meant "targeted at the creditor" at least in the sense that the injury is certain or almost certain to occur. Id. at 881. Since "intentional harm may be very difficult to establish, the likelihood of harm in an objective sense may be considered in evaluating intent." Id. Although the court cites In re Long in support of its conclusion granting discharge, it actually enunciates a significantly more restrictive standard. [FN7]

> FN7. The court also cites Cassidy v. Minihan, 794 F.2d 340 (8th Cir. 1986), which held that an injury caused by a drunk driver was not an intentional injury and therefore the debt was dischargeable. Cassidy considered the legislative history connected with the enactment of the bankruptcy code and determined that "Congress intended to bar the discharge of intentionally inflicted injuries," id. at 344, but it did not consider by what standard such intent would need to be shown and it did not have the benefit of the many other circuit discussions which have issued since 1986.
>
> Subsequent to the events giving rise to Cassidy, Congress amended the statute to bar discharge of debts arising from drunk driving accidents, see 11 U.S.C. § 523(a)(9) (1997), illustrating that Congress can easily amend the statute if it is unhappy with its interpretations.

Dr. Geiger's debt should not be discharged under In re Long because his admitted administration of substandard care shows an almost certain likelihood of harm resulting from headstrong and knowing acts. The bankruptcy court found that Mrs. Kawaauhau reported to Dr. Geiger complaints of fever and a swollen foot which was oozing pus. After receiving test results that changed his initial diagnosis from thrombophlebitis to one of infection, Dr. Geiger knew the most effective treatment was intravenous penicillin, and yet he prescribed oral penicillin. He then traveled away and left his patient in the care of other doctors who switched Mrs. Kawaauhau to intramuscular penicillin and Moxam and authorized a transfer to a specialist. When he returned, Dr. Geiger noted that Mrs. Kawaauhau appeared to be doing better after his absence. He chose to terminate her intramuscular treatment, however, to cancel the transfer to a specialist, and to discontinue all antibiotics only four days after starting them. Dr. Geiger admits he knew his care was substandard, and the uncontested expert testimony was that his intentional substandard care harmed Mrs. Kawaauhau. The district court did not err in concluding that the evidence and the findings of the bankruptcy court prevent discharge under In re Long.

Interpreting § 523(a)(6) to require an intentional tort and proof of a specific intent to injure does not further the policy underlying this section. Section 523(a) makes it clear that Congress did not intend all debts to be forgiven, notwithstanding its general policy of allowing a debtor a "fresh start." See Miera, 926 F.2d at 745. It intended to relieve honest and unfortunate debtors. In re Molitor, 76 F.3d 218, 220 (8th Cir. 1996). The same House report cited by the court notes one purpose of the 1978 amendments was to provide a more effective remedy for the "unfortunate consumer debtor." H.R.Rep. No. 95-595, at 4, reprinted in 1978 U.S.C.C.A.N. at 5966. Examples given of "unfortunate consumer debtors" include families suffering from a serious illness, unemployment, or aggressive consumer creditors. H.R.Rep. No. 95-595, at 116, reprinted in, 1978 U.S.C.C.A.N. at 6077. While examples listed in a committee report should not be regard as exhaustive, Dr. Geiger can hardly be characterized as an unfortunate consumer debtor. He is a medical doctor who knowingly administered substandard care to his patient. He was found by a jury to have committed malpractice, but he did not carry malpractice insurance. He had no other debts than the malpractice judgment and filed his petition for bankruptcy to avoid payment of that judgment. The unfortunate consumer in this case could easily be seen to be on the opposite side from the debtor.

By enacting the exceptions to discharge, Congress has specified that some debtors may disentitle themselves to relief, but the court's definition of "willful" is so narrow that it would defeat the purpose of § 523(a)(6) by restricting it to intentional torts or the unusual circumstance where a debtor is "foolhardy enough to make some plainly malevolent utterance expressing his intent to injure his creditor" or to express the belief that injury was substantially certain to follow. In re Conte, 33 F.3d at 308 (citation omitted). Requiring proof of a objective intent to harm "would undermine the purposes of [§ 523(a)(6)] and place a nearly impossible burden on a creditor who wishes to show that

a debtor intended to do him harm." In re Conte, 33 F.3d at 308 (citation omitted); see also In re Long, 774 F.2d at 881.

The court has greatly expanded the meaning and significance of the few words in the legislative history and has established a new standard that differs from the practice in the nine other circuits which have examined the section. Seven circuits utilize a definition which includes an intentional act substantially certain to lead to injury or one that would necessarily lead to it. [FN8] Two circuits use what might be characterized as a knowing disregard standard, and one has ruled only that the statute does not require specific intent. To the extent uniform interpretation of the bankruptcy code is seen as a policy goal, the court today does nothing to further it. See e.g., Perkins, 817 F.2d at 395 (Engel J. concurring).

FN8. Three of these also have an alternative standard similar to the court's requirement of purpose to cause injury, but they do not limit the creditor to this option alone.

There is no reason to create a special shield for medical malpractice judgments without a showing that Congress intended to exempt this category of debts from the reach of § 523(a)(6). Just as with other types of debts, the facts of the case must be examined in order to decide the issue of discharge. Nondischarge of Dr. Geiger's debt would not mean that all other malpractice judgment debts could not be discharged. [FN9] Dischargeability depends on the facts of the individual case and whether the proof rises above reckless disregard of the rights of the creditor, whether proven by subjective intent to injure or by objective probability that the injury was necessarily or substantially certain to follow from the intended act. [FN10]

FN9. Several other red herrings have also been raised. The court's suggestion that a different result in this case would lead to an interpretation of § 523(a)(6) that would cover even a breach of contract has no support in the record.

Neither does the statement at oral argument by counsel for Dr. Geiger that failure to discharge his debt would lead to higher malpractice insurance rates.

FN10. An act that will necessarily lead to harm is the equivalent of one substantially certain to do so because "ill effects are probablistic" and it cannot be predicted that a particular result is certain or necessary. In re Conte, 33 F.3d at 308 n. 2.

The findings and record here show conduct that was more than reckless, specifically the knowing administration of substandard care that was substantially certain to cause injury. Absent "a very obvious and exceptional showing of error," this court is not free to reevaluate the evidence presented in the bankruptcy court. Judge v. Prod. Credit Ass'n of the Midlands, 969 F.2d 699, 700 (8th Cir.1992) (per curiam); see also In re Exec Tech Partners, 107 F.3d 677, 680 (8th Cir.1997). [FN11] Since Dr. Geiger inflicted a willful and malicious injury within the meaning § 523(a)(6), I would affirm the judgment denying the discharge of his debt to the Kawaauhaus.

FN11. Unlike the bankruptcy judge who was the trier of fact, the court believes that Dr. Halford's expert testimony only shows that Dr. Geiger's treatment resulted in the worsening of Mrs. Kawaauhau's infection, not that it necessarily led to any other injury to her. It bases this distinction on its suspicion that the course of an infection is notoriously difficult to predict. In contrast, the bankruptcy court found that Dr. Geiger's treatment led to the worsening of Mrs. Kawaauhau's condition and the eventual amputation of her leg. Even if there are two reasonable interpretations of the evidence, this court is required to defer to the bankruptcy court's findings absent clear error. In re LeMaire, 898 F.2d 1346,1349 (8th Cir.1990).

APPENDIX E

11 U.S.C. §523. Exceptions to Discharge.

(a) A discharge under 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt — . . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.